

SERVED: May 19, 1992

NTSB Order No. EA-3565

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

SE-10716

ALLAN RITCHIE CALDER,

Respondent.

OPINION AND ORDER

The Administrator has appealed from the Order
Administrative Law Judge Jerrell R. Davis issued in this
proceeding on February 9, 1990,¹ granting respondent's motion
to dismiss the complaint under the Board's stale complaint
rule, because of the Administrator's failure to file a timely

¹A copy of the law judge's order is attached.

response to the respondent's motion.²

The complaint which is the subject of this proceeding alleges that on August 25, 1988, respondent operated, as pilot-in-command, a British Airship G-BNVV in the area of

²The Board's stale complaint rule, 49 CFR Part 821.33, provides:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 7 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

(3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect of the Administrator's good cause issue allegations.

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction."

Montgomery Field, San Diego, at an altitude from 150 to 300 feet above ground, in violation of FAR Section 91.79(c). It also alleges that respondent, a British subject, did not have his airman and medical certificates³ in his possession at the time of the operation, contrary to the terms of an FAA Special Flight Authorization issued for the aircraft, and in violation of FAR sections 61.3, 61.118, 91.28(c), 375.21, and 375.22. The Administrator alleges that as a result, respondent lacks the qualifications required of a holder of a commercial pilot certificate.

Respondent filed a motion to dismiss the complaint as stale, claiming that he had filed a timely report with NASA under the Aviation Safety Reporting System in which he explained that the low flight over Montgomery Field was due to a radio failure between respondent and his ground crew. Respondent also indicated in his NASA report that he did not have his certificates in his possession due to a problem with overseas mail, but that he had been told by the airship's owner that his operation of the aircraft had been cleared by the local FAA Flight Standards District Office. These claims remain un rebutted.

³There is no allegation contained in the complaint that respondent's certificates are not valid.

The Administrator asserts in his appeal brief⁴ that the law judge's dismissal of the complaint under Rule 33(a)(1) is erroneous because, notwithstanding the fact that he failed to file a timely response to the motion to dismiss,⁵ the complaint is immune to dismissal as subsection (a)(1) of Rule 33, which mandates an explanation for his untimeliness, does not apply to complaints which allege lack of qualification. The Administrator further argues that the law judge abused his discretion by summarily dismissing the complaint without considering, in the light most favorable to the complainant, that the pleadings on their face allege lack of qualification.⁶ We disagree.

In Administrator v. Rothbart and Voorhees, NTSB Order No. EA-3052 (1990), recon. denied, NTSB Order No. EA-3356 (1991), we found that where a respondent's motion to dismiss raises the question of whether the Administrator is attempting to allege lack of qualification as a device to avoid dismissal of a complaint under Rule 33, it is incumbent upon the Administrator to respond to the points made in

⁴Respondent has filed a brief in reply.

⁵No explanation for the failure to file a timely response has been offered by the Administrator.

⁶Contained in the Board's file is a reply to respondent's motion dated February 15, 1990. In reply to the Rule 33 issue the Administrator asserts that the complaint should not be dismissed because it alleges lack of qualification, without any further discussion or explanation of that assertion.

support of respondent's position, and the Administrator's failure to do so leaves unchallenged the circumstances described in the motion to dismiss. In the instant case, the Administrator failed to timely respond, and when he did respond, he failed to address any of respondent's substantive arguments -- despite the fact that they necessarily raised the issue of whether the Administrator's allegation of lack of qualification was other than a procedural device. Moreover, because we find that it cannot be fairly said that this complaint presents an issue of qualification,⁷ we conclude that the law judge did not abuse his discretion in dismissing the complaint.⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's order dismissing the complaint is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷The principal operating violation, an instance of low flight, were it proved, would typically warrant no more than a 30 day suspension, and here there were at least two reasons offered why even that sanction might not have been applied -- an allegation of radio failure, and the filing of a timely ASRP report. With regard to the non-operational violations, they appear to have been technical and their prosecution inconsistent with the Administrator's subsequent authorization for flight of this craft by (and limited to) respondent.

⁸For this reason, we find that the law judge correctly ruled that Rule 33(a)(1) was applicable.